Supreme Court, U.S.
FILED
MAY 6 1992
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(2)

No. 91-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM F. JENNINGS, *et al.*

Petitioners

vs.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF FRANCESCA RAINES AND ROYCE INGERSOLL D/B/A INSTITUTE OF CRIMINAL AND CIVIL INVESTIGATION TO PETITION FOR WRIT OF CERTIORARI OF JENNINGS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Francesca Raines and Royce Ingersoll d/b/a Institute of Criminal and Civil Investigations, two (2) of the Defendants in the District Court and two (2) of the Appellees in the United States Court of Appeals for the Fifth Circuit respectfully submit this their Response to Petitioner Jennings' Petition for Writ of Certiorari.

STATEMENT OF THE NATURE OF THE CASE

Respondents Ingersoll and Raines do not dispute the Statement of the Case contained within the Opinion of the Fifth Circuit set out in *Jennings, et al v. Joshua Independent School District, et al,* 869 F.2d 870, 871 (5th Cir. 1989) (Pet.App.27a-42a) and *Jennings, et al v. Joshua Independent School District, et al,* 948 F.2d 194, 196 (5th Cir. 1991) (Pet.App.1a-9a). Respondents would, however, emphasize the following:

1. Petitioner Jennings had voiced strong disapproval of the sniffer-dog program prior to the events which are at issue here.

2. On the day of the incident in question, Petitioner Jennings threatened to sue everyone on the premises, including Respondent Raines.

3. Petitioner Jennings sued Respondents Raines and Ingersoll in spite of the fact, as he testified at trial, that he did not think that his or his daugher's constitutional rights had been violated by any of the actions of Respondents Raines or Ingersoll.

4. Petitioner Jennings, with his attorney Petitioner Gladden, conducted no pre-complaint investigation at all to determine whether there was any basis for a theory of collusive conduct between the police and the other Defendants. There was no basis for Petitioners' suspicion that the school was in collusion with the police.

SUMMARY OF ARGUMENT

Petitioner Jennings has waived review of any issue regarding joint and several liability with Petitioner Gladden for sanctions imposed pursuant to Rule 11 violations.

In the alternative, the Court did not abuse its discretion in jointly and severally imposing sanctions against Petitioners Jennings and Gladden. There was sufficient evidence adduced by the trial court to show Petitioner Jennings' culpability; the violations were not wholly based on Petitioner Jennings' attorney's errors with regard to the law.

ARGUMENT AND AUTHORITY

WAIVER

Though the issue of propriety of imposition of Rule 11 sanctions has been an issue in this case since the filing of the first appeal, Petitioner Jennings did not raise the issue of the propriety of his joint and several liability for sanctions until this case had been briefed and argued in the Fifth Circuit for the second time. This issue was not raised in the initial Application for Petition for Writ of Certiorari filed during the October Term, 1989. Therefore, it is waived.

Generally, an appellate court will not address on appeal an argument or issue not raised in the trial court or in a brief as such issue has not been properly preserved for appeal. *Picco v. Global Marine Drilling Company,* 900 F.2d 846, 849 n.4 (5th Cir. 1990). See also *United Paperworkers International Union v. Champion International Corporation,* 908 F.2d 1252, 1255 (5th Cir. 1990) ("an appellant abandons all issues not raised in its *initial* brief", original emphasis). The basis for this premise is that allowing a party to first raise an issue on appeal results in unfair surprise, and tends to prolong litigation through remands for additional findings. There needs to be finality in litigation for the sake of judicial economy. *Hicks v. Gates Rubber Co.,* 928 F.2d 966, 970-971 (10th Cir. 1991).

Respondents do recognize that there are exceptions to this rule, though rare.

> Exceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of law to prevent miscarriage of justice . . . The failure to raise the issue with the trial court precludes review except for the most manifest error.

928 F.2d at 970. Review of such an issue is discretionary and will be addressed on a case by case basis. *Id.*

In *Taft Broadcasting Company v. United States*, 929 F.2d 240, 244 (6th Cir. 1991) the Sixth Circuit has included an interesting discussion of this issue. When an issue of fact is newly raised on appeal and would necessitate or require a determination of facts, that is "generally deemed good reason to refuse consideration of the issue for the first time" on appeal. If the issue addressed is a question of law, courts will on occasion consider such new issue. *Id.* Generally, "[a] federal appellate court can resolve an issue not passed on below 'where the proper resolution is beyond any doubt or where injustice . . . might otherwise result.' " *Id.*

Petitioner Jennings is not raising a newly presented issue of law, but rather a newly presented issue of fact. He is asking this Court to review the record to determine if there is sufficient evidence to hold him jointly and severally liable for sanctions. Though he couches his arguments in terms of new issues of law, this is misleading and readily apparent upon reviewing his argument. He states that "sanctions predicated on the improper purpose or intentionally wrongful conduct of Mr. Jennings personally are not at issue here," and "There is not a shred of evidence in the record of any ulterior motive that Mr. Jennings had against any of the defendants. . . ." (Petition for Writ of Certiorari, Jennings p.10, p.10n.1) Even a cursory review of the trial court's Order of January 5, 1988 (Pet.App. 10a-24a) and the Fifth Circuit's Opinion of April 12, 1989, (Pet.App. 27a-42a), show that there was

ample evidence upon which the trial court based its ruling regarding sanctions.

This is not a case where "proper resolution is beyond any doubt or where injustice might otherwise result". Thus, this Court need not address this newly raised issue.

Petitioner Jennings has cited several cases in support of his argument for review of this issue. Respondents are aware of the remand in *In Re Ruben v. Warren City Schools*, 825 F.2d 977 (6th Cir. 1987), but would argue that the facts are distinguishable. In *Ruben*, the majority of the sanction fell on Plaintiff Rathbun because she never had an adequate opportunity to be heard as she had been "abandoned" by her attorneys, and the district court's order did not clearly set forth the legal grounds for sanctioning Rathbun. In the case *sub judice*, the trial court imposed sanctions jointly and severally. Further, it clearly set forth the legal bases for sanctions, those being Rule 11 and 42 USC §1988.

In *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3rd Cir. 1991), the case was remanded for consideration of whether sanctions should have also been levied against Plaintiff's attorney, or solely against Plaintiff Quiroga. Sanctions were initially imposed only against Plaintiff Quiroga though there appeared to be as much fault on the attorney's part as on the part of Plaintiff for filing a frivolous suit. In the case at hand, the trial court clearly delineated Petitioner Jennings' role in the frivolous suit, in conjunction with the conduct of Petitioner Gladden. Remand in this case would not net any new or surprising information and is unnecessary.

In *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, the Court addressed the conflict of interest which can arise when an attorney represents a party on appeal though Rule 11 sanctions have been imposed against both. The facts are quite different from those at hand as Plaintiff Calloway appeared *pro se* on appeal, which appeal was dismissed for failure to prosecute; and he appeared to have serious mental

problems. The Court did acknowledge that "when the party does know that the filing and signing is wrongful and the attorney reasonably should know, then sanctions against both are appropriate". *Id.* at 1475.

The case was remanded for a determination of Plaintiff's responsibility for violative conduct. In the case at hand, Petitioner Jennings' conduct was clearly set forth by the trial court and considered in its ruling. There can be no doubt as to Jennings' culpability based on the evidence.

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), the issue is whether a law firm rather than an individual attorney should be liable for sanctions. Sanctions against a Plaintiff are nowhere addressed in the opinion.

Finally, in *White v. General Motors Corporation, Inc.*, 908 F.2d 675 (10th Cir. 1990), the Court was found to have assessed joint and several liability without considering the relative fault of the Plaintiffs and their attorney. The cause was remanded for more specific findings.

ARGUMENT AND AUTHORITY

JOINT AND SEVERAL IMPOSITION OF SANCTIONS

If this Court chooses to address the merits of Petitioner Jennings' newly raised issue, Respondents would argue that the trial court did not err in imposing sanctions against Petitioner Jennings and Petitioner Gladden, jointly and severally.

It has long been established that Rule 11 does not solely apply to attorneys. Further, for sanctions to be imposed against a party, he need not have actually signed a pleading. Sanctions are appropriate against a party if they have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *Chambers v. NASCO*, ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991), citing *Alyeska Pipeline Service Co. v. Wilderness*

Society, 421 U.S. 240 (1975). If a Plaintiff's claim is found to have been frivolous, unreasonable, or groundless and this was apparent to the Plaintiff, then sanctions against a party would be appropriate. *Eastway Construction Corporation v. City of New York*, 762 F.2d 243,252 (2nd Cir. 1985).

In his Brief, Petitioner Jennings asserts that any sanctionable conduct was perpetrated by his attorney, Petitioner Gladden herein. He claims that he is being held responsible for Petitioner Gladden's failure to adequately inquire into the law. That is not the case as is so clearly set forth by the trial court in its January 5, 1988 Order and the Fifth Circuit's 1989 Opinion. (Pet.App. 10a-24a, 27a-42a).

Petitioner Jennings is not an innocent neophyte. At the time of this incident, he was in his own words, "a Federal law enforcement officer." As a law enforcement officer, one would assume Petitioner's familiarity, however cursory, with search and seizure law.

In his Brief, Petitioner Jennings asserts that there was no evidence that he personally engaged in intentionally wrongful conduct. He also asserts that the Court of Appeals based the Rule 11 sanctions "solely" on the failure of Petitioner's attorney. Petitioner has only referred this Court to the Fifth Circuit's December 10, 1991 Opinion. He has chosen to ignore the Fifth Circuit's earlier Opinion which quite specifically details Petitioner Jennings' culpable conduct in this tiresome litigation.

This is not a case of a nonsigning party being held responsible for his attorney's misconduct. It is a case where Petitioner Jennings actively participated in pressing a frivolous suit with full knowledge of its baselessness. There is no confusion in the case law on this issue. Many of the cases cited by Petitioner go to this very issue and affirmed sanctions against Plaintiffs and their attorneys.

In *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985), the Court found that sanctions against the

Plaintiff were proper as she was the "catalyst behind this frivolous motion". In *Chevron*, the Plaintiff did not sign the Motion which resulted in sanctions.

In *Southern Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783 (5th Cir. 1986), sanctions were imposed against Plaintiff and its attorneys, though Plaintiff did not sign any pleadings. The Court found that the legal arguments put forth on Southern Leasing's behalf were without merit. The fact that these arguments were almost mirror images of an earlier suit filed by Southern Leasing contributed to the Court's decision to hold Southern Leasing liable for sanctions.

The Court was found to have acted within its discretion in sanctioning both Plaintiffs and their attorney in *Robinson v. National Cash Register Company,* 808 F.2d 1119 (5th Cir. 1987). Once again, the Plaintiffs did not sign any pleadings, yet were still sanctioned. The sanctions were based on the fact that both Plaintiffs and their attorney continued to press a suit not well grounded in fact or law, and which was clearly precluded by *res judicata.*

In *Bastien v. Rowland,* 116 F.R.D. 619 (E.D. Mo. 1987), the Court upheld an award of sanctions against Plaintiffs and their counsel. It appears that the reasons for sanctions were both a lack of proof of Plaintiffs' claims and counsel's conduct of the litigation.

> The Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction.

Id. at 621.

A frivolous dismissal motion resulted in sanctions against Defendants and their attorneys, jointly and severally, in *Ortho Pharmaceutical Corporation v. Sona Distributors,* 847 F.2d 1512 (11th Cir. 1988). The Court found that counsel's prefiling inquiry regarding a defense of lack of personal jurisdiction over Defendants was unreasonable, yet sanctions were imposed against both.

In *Painewebber, Inc. v. Can Am Financial Group, Ltd.*, 121 F.R.D. 324, 330 (N.D. Ill. 1988), the Court noted that, "Rule 11 applies to every statement and claim in a paper." The Court found that Defendants' attorney did not conduct a reasonable investigation into the facts of a Motion to Vacate, and that Defendant George lied to his attorney regarding certain facts.

More recently, in *Romala Corporation v. United States*, 927 F.2d 1219 (Fed.Cir. 1991), sanctions were upheld against Plaintiff and its attorney for a frivolous appeal. Part of the sanctions were to be born solely by counsel for frivolity in the types of arguments employed. The remaining sanctions were imposed jointly for filing a frivolous appeal.

Because Plaintiffs' complaint had no reasonable factual basis when filed and Plaintiffs were aware of this, the Court in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), imposed sanctions against Plaintiffs for their bad faith conduct.

In *Peregoy v. Amoco Production Company*, 133 F.R.D. 113 (E.D. Tex. 1990), sanctions were jointly imposed against Plaintiffs and counsel even though the Court held that the violative conduct resulted from Plaintiffs' counsel's failure to make a reasonable inquiry into the facts or the law before filing suit.

Though many more cases on this issue are available for perusal, they are not at odds with the cases cited above.

CONCLUSION

The trial court did not err in imposing sanctions against Petitioners Gladden and Jennings jointly and severally. Petitioner Jennings waived review of this issue on appeal by not presenting it in the initial appeal of this matter.

PRAYER

Based on the foregoing arguments, applicable case law, and the evidence presented, Petitioner Jennings' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ HOLLYE C. FISK

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PROOF OF SERVICE

I, Hollye C. Fisk, Counsel for Respondents Raines and Ingersoll, depose and state that on the ___ day of May, 1992, I served three (3) copies of this Response of Raines and Ingersoll to Petition for Writ of Certiorari of Jennings on Counsel of Record Laurance L. Priddy, Attorney at Law, 301 Commerce Street, Suite 1210, Fort Worth, Texas 76102; Alan B. Morrison, Public Citizen Litigation Group, 2000 P Street, N.W., Suite 700, Washington, D.C., 20036; as well as Counsel of Record for other Respondents, David B. Owen, Quillin, Owen & Thompson, 550 Bailey, Suite 601, Ft. Worth, Texas 76107; and Mark M. Donheiser, Strasburger & Price, 901 Main Street, Suite 4300, LB 175, P.O. Box 50100, Dallas, Texas 75250.

/s/ HOLLYE C. FISK

Hollye C. Fisk
Affiant

SWORN TO AND SUBSCRIBED before me on this the ___ day of May, 1992.

Notary Public, in and for
State of Texas

Printed Name of Notary Public

My commission expires: